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No. 467

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

JAMES ALVADO,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the District Court is reported at 194 F. Supp. 314 (Petitioner's Appendix, Court of Appeals 288a). The opinion of the Court of Appeals on the first appeal is reported at 229 F. 2d 408 (Petitioner's Appendix 24). The opinions of the Court of Appeals on this appeal are reported at 303 F. 2d 718 (Petitioner's Appendix 31, 37).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

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[1] There is only one petitioner. Francis M. Bilbee, one of the parties in the *Foster* case, expressly requested that he be dropped as a plaintiff since his rights were there litigated. See 194 F. Supp. 314, footnote 1.

Question Presented

The only question presented is the correctness of the Second Circuit's judgment approving the trial court's findings that "plaintiff has failed to establish that there was collusion between the Union and the defendant, or that defendant intended to discriminate against veterans, or that defendant agreed to the Union proposal in bad faith", in adopting the 1946 collective bargaining agreement. In other words the Second Circuit held that petitioner has failed to prove the cause of action alleged under the Act, 303 F. 2d 718, aff'g 194 F. Supp. 319 (Petitioner's Appendix 31).

Statute Involved

The pertinent provisions of the Selective Training and Service Act of 1940 (50 U.S.C. App. 308, now Universal Military Training and Service Act Section 9, 50 U.S.C., App. 459) are set forth in the Petition at pages 2, 3.

Statement of the Case

This is the fourth time the validity of the vacation pay provision in the 1946 collective bargaining agreement entered into by the respondent with the petitioners' Union has been before this Court on Certiorari. On each of the three prior occasions, petitioners sought review of the decisions of three Circuit Courts which had refused judgments in their favor on the merits. This Court denied certiorari in each. *Dougherty* v. *General Motors Corp.*, 176 F. 2d 561 (3rd Cir. 1949), 338 U. S. 956, No. 518, February 13, 1950; *Foster et al.* v. *General Motors Corp.*, 191 F. 2d 907 (7th Cir. 1951), 343 U. S. 906, No. 533, March 24,

1952; and *Alvado* v. *General Motors Corp.*, 229 F. 2d 408 (2d Cir. 1956), 351 U. S. 983, No. 931, June 11, 1956 (Respondent's Appendix, Court of Appeals, 1a).

The salient facts are briefly summarized for the convenience of this Court.[2]

The complaint at bar, filed July 29, 1952, charged an alleged "discrimination" against petitioner, a veteran, and the class he purportedly represents, by virtue of the vacation pay provisions of this 1946 collective bargaining agreement. Recovery of vacation allowance for the year 1946 was demanded on the ground that this alleged discrimination violated the Act.

Vacation allowance had been the subject of collective bargaining between respondent and petitioner's collective bargaining agent beginning in 1940. The provision was renegotiated each year.

The 1946 provision under attack used earnings of the previous calendar year rather than of the fiscal year as the basis for determining a vacation allowance. It was adopted as a result of collective bargaining negotiations which took place during a lengthy strike which commenced on November 21, 1945 and terminated on March 19, 1946. This strike, which lasted 113 days, terminated with the execution of the collective bargaining agreement in which this vacation arrangement was incorporated. The provision here under attack was a counter proposal by the

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[2] We take issue with petitioner's summary of the facts commencing at page 4. The statement at page 5 thereof, "that the Corporation's negotiators also knew very accurately what financial loss (or gain) would be caused to both veterans and non-veterans by its percentage of earnings device . . .", is grossly inaccurate. This misstatement is readily apparent from a reading of petitioner's very citations of authority (Opinion of Trial Court, Petitioner's Appendix, Court of Appeals 296a and Opinion of Court of Appeals, Petitioner's Appendix 34).

Union to a suggestion by the Corporation which sought to use the fiscal year July 1945 to June 1946 as the basis for computing vacation pay allowance.

Summary Judgment was granted the defendant and plaintiff's cross-motion for similar relief was denied. On appeal, the Second Circuit held that the denial of plaintiff's motion for Summary Judgment was proper since vacation pay was subject to annual negotiation and agreement and appellant was not entitled as a matter of law to vacation pay ("other benefits under the Act"). At the same time, the order granting Summary Judgment in favor of defendant was reversed on the ground that it deprived the plaintiff of the opportunity to cross-examine defendant's officials on the issue of "bad faith" and prevented a trial court from an evaluation of their credibility by observing their demeanor while they testified. The Second Circuit also directed that the plaintiff be given the opportunity at a trial to produce evidence in addition to the agreement in support of the allegation of the complaint charging "bad faith" (229 F. 2d 412; Respondent's Appendix, Court of Appeals 5a).

The plaintiffs, not content to be sent to the trial court, petitioned this Court for certiorari (October Term, 1955, No. 933). The petition was denied (351 U. S. 983, *supra*).

The trial directed by the Second Circuit finally took place in January 1961 and resulted in a judgment in favor of the defendant dismissing the complaint (194 F. Supp. 314). The petitioner there had the "opportunity at a trial" to present evidence and was afforded a complete cross-examination of Louis G. Seaton, the defendant's vice president, to whom specific reference had been made in the Second Circuit's opinion directing the trial (229 F. 2d 411 at 412; Respondent's Appendix, Court of Appeals 5a).

After entry of this judgment, petitioner again filed an appeal to the Second Circuit. On May 24, 1962 that Court affirmed the judgment of the trial court (one judge dis-

senting) 303 F. 2d 718 (Petitioner's Appendix 31). Petitioner's application for a rehearing and request for rehearing *en banc* were denied on June 15, 1962. The present petition for certiorari was thereafter filed.

Argument

The petitioner asserts at page 10 that the court below erred in holding "that discriminatorily depriving returning veterans of vacation pay is . . . not a violation of Section 8 of the Act."

A review of their opinion discloses no such holding. The Second Circuit held that to establish *legal discrimination* and recover under the Act there must be proof of a "purpose or motive to discriminate" rather than a mere showing of disadvantage to veterans (303 F. 2d 718, at 721; Petitioner's Appendix 35). This determination is in harmony with the decisions of this Court. An analysis of these cases reveals that this Court has consistently distinguished between disadvantage to veterans and legal discrimination which constitutes a violation of the Act. Indeed no case has been cited where this Court held such disadvantage constituted discrimination. Petitioner's main arguments are founded upon the misuse of the word "discrimination". It is submitted that no amount of strained semantics nor tables[3] attached to the petition warrant review by this Court on certiorari.

I

The decision below is consistent with the principles established by this Court.

Vacation pay does not come within those provisions of the Act insuring restoration of a veteran's rights without

[3] Table I at page 42 of the petition was not in evidence at the trial. It first appears in the petitioner's brief on appeal to the Court of Appeals.

loss of seniority. It comes within the provision of the Act that a veteran "shall be entitled to participate in insurance and other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence, in effect with the employer at the time such person was inducted" into the Armed Forces. *Alvado* v. *General Motors Corporation*, 229 F. 2d 408, cert. den. 351 U. S. 983 (1956); *Siaskiewicz* v. *General Electric Co.*, 166 F. 2d 463 (2 Cir. 1948); *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (2 Cir. 1948).

The Second Circuit pointed out that respondent's pre-1946 collective bargaining agreements were negotiated and changed annually and there was no established rule or practice as to vacation pay at the time the petitioner and the class he represents entered military service. That part of the 1946 collective bargaining agreement which contains the vacation pay provisions is therefore not *per se* violative of the Act insofar as applicable to returning veterans. *Alvado* v. *General Motors Corp.*, *supra*.

In *Aeronautical Indus. Dist. Lodge* v. *Campbell*, 337 U. S. 521, and *Ford Motor Company* v. *Huffman*, 345 U. S. 330, this Court had before it for review under the Act, certain provisions of collective bargaining agreements which were disadvantageous to veterans. In both instances this Court held that the provisions were not *per se* violative of the Act. In each case the employer defendants knew that such disadvantage would be the result of their agreements with the Union.

In *Ford Motor Company* v. *Huffman*, *supra*, this Court stated at 345 U. S. (p. 338):

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employes and classes of employes. The mere existence of such differences does not make them invalid. The complete satisfaction of

all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables."

In the instant case the complaint charged that the vacation pay provision "was a device of hostility directed at veterans and having a substantial adverse effect on them alone," that the defendant "had the purpose" and "knew and intended" this result; and that defendant "intended such unlawful discrimination" for "its own benefit and gain and to the financial injury and loss to plaintiff."

The Second Circuit held that the agreement itself did not violate the Act, although some disadvantage to veterans resulted, 229 F. 2d 408, *supra*. It directed a trial of the issue of "bad faith" as alleged in the complaint.

The true motives of the respondent in accepting the Union's vacation pay proposal were amply demonstrated at this trial by petitioner's attorneys themselves in their exhaustive and cumulative examination of Louis G. Seaton. This individual was the respondent's Vice President referred to in the Second Circuit's opinion. Indeed, he was called as a witness by the petitioner's attorneys themselves. After reviewing his testimony and all of the exhibits, the trial court stated (194 F. Supp. 314 at 318; Petitioner's Appendix, Court of Appeals 295a).

"* * * The intent of the defendant in agreeing can readily be said to have been to end the strike, to begin post-war production, to reach a fair and equitable agreement, and not, as the plaintiff contends, to discriminate against the returning veterans. The evidence adequately supports this, and the defendant in

its over-all program surpassed the basic protection afforded veterans by the Selective Training & Service Act."

The Second Circuit approved this finding of fact and held it was not clearly erroneous[1] (303 F. 2d 718; Petitioner's Appendix 31).

We believe that one comment by the petitioner at page 9, footnote 7, of the petition requires specific mention. There petitioner asserts that only veterans sustained adverse effects as a result of the vacation pay provisions and "the evidence shows plainly that none of those 'laid off' or on leave was so injured, and respondent did not pursue this point on appeal". It is difficult to reconcile this assertion with the express finding of the trial court that the vacation pay provisions "also militated against all those employes, admittedly a smaller group than the veterans, who for one reason or another were on leave of absence other than military in 1945, and those employes who were laid off but returned in the first part of 1946 and who retained their seniority" (194 F. Supp. 319; Petitioner's Appendix, Court of Appeals 297a). This was one of the findings of the trial court, held not be to "clearly erroneous" by the Court of Appeals (303 F. 2d 718; Petitioner's Appendix 31).

II

A real and vital distinction exists between this Court's decisions under Section 8 of the Act and determinations of legal discrimination under other federal statutes.

The petitioner's argument in the main is based on the principles set forth in *Radio Officers* v. *Labor Board*, 347

[1] This Court has held that the clearly erroneous rule (F.R.C.P. 52a) is peculiarly applicable to cases involving the necessity of proving intent. *U. S.* v. *Yellow Cab Co.*, 338 U. S. 338; *U. S.* v. *Oregon State Medical Society*, 343 U. S. 326.

U. S. 17; *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793, and *Katz* v. *Labor Board*, 369 U. S. 736. These cases construed an employer's conduct under the National Labor Relations Act. We have no quarrel with these cases but we do contest their applicability here. Petitioner cites these cases for the proposition that an inference of intent to discriminate must be made as a natural consequence if the act performed is disadvantageous to veterans.

These cases sanction the Congressional declaration in the National Labor Relations Act that an employer may not encourage or discourage Union membership, and is required to bargain in good faith. Clearly, hostility, bad faith, or dishonesty of purpose are there immaterial if either of these declarations of Congressional intent are thwarted by an employer's conduct. But the rule of these cases is clearly different from the established law as to discrimination against veterans under the Selective Service Act. In the cases arising under the Act, this Court has stated Congressional intent to be that agreements which disadvantage veterans are not *per se* violative of the Act in the absence of proof of bad faith. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, *supra; Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, *supra.*

Though permitted full opportunity at a trial, the petitioner has failed to adduce such proof in the case at bar. *Alvado* v. *General Motors*, 303 F. 2d 718 at 721 (Petitioner's Appendix 31).

III

The law with respect to vacation pay ("other benefits") under the Act is now well settled.

The petitioner urges that the question involved herein is "of grave and continuing importance in the administration of the veterans' re-employment statutes". Finding no support for this assertion in a synthesis of the reported

cases under the Act,[5] the petitioner seeks to interject new matter before this Court. The main thrust of this argument is pitched on private advices from the Department of Defense, statistics from the Bureau of Labor Statistics, the Monthly Labor Review or proposals for new legislation from the Secretary of Labor.

Clearly, these documents are irrelevant to the question involved.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be denied.

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[5] The cases cited in footnote 14, page 14, of the petition fail to substantiate this contention. An analysis of these cases discloses that all of the Courts of Appeals which considered the question of vacation pay under the Act are in harmony. It also is significant that none of the causes of action involved therein arose during the last ten years. The absence of litigation during this period is no doubt attributable to these decisions which have clearly established veterans' rights. See American Law of Veterans (2nd Edition, 1954), Sec. 193, page 147, especially footnote 3.